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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

AARON RANGEL, as an individual and on behalf of others similarly situated,

Plaintiff,

v.

FEDEX GROUND PACKAGE SYSTEM, INC., a Delaware Corporation, and DOES 1 through 100, inclusive,

Defendant.

Case No. SACV13-01718 DOC (JCGx)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Date: Sept. 8, 2014
Time: 8:30 a.m.
Crt. Rm.: 9D

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The parties have reached a proposed settlement that, if approved by the Court, will fully resolve this action. Plaintiff Aaron Rangel, on behalf of himself and all others similarly situated, moves this Court for an order: (1) preliminarily approving the proposed Settlement Agreement and the class action settlement it embodies; (2) preliminarily certifying a settlement class pursuant to Federal Rule of Civil Procedure 23 (a), (b)(3), and (e), and appointing Aaron Rangel as Class Representative; (3) appointing Plaintiff's Counsel as Class Counsel pursuant to Federal Rule of Civil Procedure 23(g); (4) approving the proposed notice plan and directing distribution of the proposed class notice and related documents (attached as Exhibits 1-3 to the proposed Settlement Agreement); and (5) setting a schedule for final approval.

Plaintiff seeks provisional certification of a settlement class of current and former non-exempt employees of Defendant FedEx Ground Package System, Inc. ("Defendant") in California who worked as package handlers at any time from September 24, 2009 through the earlier of the date of Preliminary Approval of the Settlement by the Court, or (2) September 1, 2014. The proposed class satisfies the numerosity, commonality, typicality, and adequacy prerequisites of Federal Rule of civil Procedure 23(a). The settlement class's claims for wage and hour violations of the California Labor Code and California Unfair Competition Law for monetary relief, restitution of wages, and declaratory and injunctive relief satisfy the requirements of Federal Rule of Civil Procedure 23(b)(3).

The terms of the proposed settlement are fair and are the product of serious, arm's length negotiation. The proposed settlement will require Defendant to pay $2.1 million in monetary relief for eligible class members, part of the claims administration, and attorneys' fees and costs, and to implement comprehensive, class-wide changes to their meal and rest period policies and procedures in an effort

to clarify the class's meal and rest period rights under the law.

Because the requirements for preliminary approval are met, Plaintiff respectfully requests that the Court certify a class action for settlement purposes, appoint Plaintiff's Counsel as Class Counsel, preliminarily approve the Settlement Agreement and the class action settlement it embodies, direct notice to the class, and schedule a final approval hearing.

II. SUMMARY OF THE LITIGATION

A. Pleadings

On September 24, 2013, Plaintiff filed his Class Action Complaint and initiated this action in the Superior Court of the State of California, County of Orange, identified as case no. 30-2013-00678062. On October 30, 2013, Plaintiff filed his First Amended Complaint ("FAC") with the Superior Court of the State of California, County of Orange. On October 31, 2014, Defendant filed a Petition for Removal and related pleadings.

Plaintiff's lawsuit is a class action brought by a former employee of Defendant FedEx Ground Package System, Inc. ("Defendant" or "FedEx Ground") for claims including the failure to provide meal periods, failure to provide rest breaks, failure to pay minimum wages, failure to pay overtime, failure to pay vacation wages (including floating holidays), failure to pay regular wages, failure to pay reporting time, failure to timely pay all wages owed at the time of termination of employment, record keeping violations, and unfair business practices.

On April 21, 2014, Plaintiff filed his Motion to Class Certification. *See* Dkt. 30.

B. Discovery and Investigation

At the initial status conference held on January 27, 2014, the Parties proposed an aggressive schedule that compressed much of the litigation into a short period of time. The Court agreed to the Parties proposed schedule and the Parties diligently worked to comply with the Scheduling Order. *See* Dkt. 22.

Plaintiff propounded written discovery to Defendant in the form of Special Interrogatories, Requests for Production of Documents, and Requests for Admission. The discovery yielded valuable information for Plaintiff's anticipated Motion for Class Certification, including Plaintiff's personnel file, Plaintiff's time records, Plaintiff's payroll records, employee handbooks and voluminous documents pertaining to FedEx Ground's policies and procedures for timekeeping, payroll, meal and rest periods, overtime, vacation, reporting time pay, security protocols and off-the-clock work. Hodgkins Decl. ¶ 13. Plaintiff also responded to Defendant's Special Interrogatories and Requests for Production of Documents. *Id.*

Plaintiff took the deposition of Defendant's Director of HR, Compliance and Diversity, Shannon Arnold in Pittsburgh, Pennsylvania. She was deposed on the topics of time-keeping, time records, meals periods, and electronic data pertaining to time-keeping and payroll. Hodgkins Decl. ¶ 14.

Plaintiff also took the deposition of Defendant's Senior Manager of Payroll, Michael Crawford, in Pittsburgh, Pennsylvania. He was deposed on the topics of payment of wages, the calculation of wages, and electronic data pertaining to time-keeping and payroll. Hodgkins Decl. ¶ 15.

Plaintiff also took the deposition of Defendant's Managing Director of HR Service Delivery, Kiersten Crosby, in Pittsburgh, Pennsylvania. Plaintiff deposed her on the topics of time-keeping, rest periods, meal periods, editing of time records, off-the-clock work, and electronic data pertaining to time-keeping and payroll. Hodgkins Decl. ¶ 16.

Plaintiff also took the deposition of Defendant's District Managing Director for the Southern California District, Martin Daza, in Costa Mesa, California. Plaintiff deposed him on the topics of Package Handler job titles, work duties, staffing and scheduling. Hodgkins Decl. ¶ 17.

Defendant's counsel took the video-taped deposition of Plaintiff at Defendant's offices in Los Angeles. Hodgkins Decl. ¶ 18. This deposition lasted the

entire day. *Id*. Mr. Rangel prepared for his deposition with his counsel on multiple days in Los Angeles County. *Id*.

In preparation for mediation, the parties exchanged information and data subject to the mediation privilege. Hodgkins Decl. ¶ 19.

Thus, over the course of the year encompassed by this case, the parties engaged in substantive and significant discovery and investigation. As a result of this work, the Parties fully briefed the Motion for Class Certification on the schedule set forth in the Scheduling Order. This work was also sufficient to apprise counsel of the issues and evidence pertaining to certification, liability, and damages.

C. Mediation

On April 21, 2014, Plaintiff filed his Motion to Class Certification. *See* Dkt. 30. Pursuant to the Court's order dated January 27, 2014, the motion was scheduled for hearing on June 30, 2014. *See* Dkt. 22.

On May 14, 2014, the parties engaged in mediation. Hodgkins Decl. ¶ 7. The mediation was conducted by Michael E. Dickstein, Esq. in Los Angeles. *Id*. The mediation lasted the entire day and well into the evening, but was ultimately unsuccessful. *Id*. Nevertheless, the parties agreed to continue settlement discussions, which they did through mediator Dickstein as well as through direct discussions between the parties. *Id*.

On June 2, 2013, Defendant filed its Opposition to Plaintiff's Motion for Class Certification. *See* Dkt. 37.

On June 16, 2014, Plaintiff filed his Reply in support of his Motion for Class Certification. *See* Dkt. 49.

On June 27, 2014, the parties reached an agreement to settle and immediately undertook the task of hammering out the substantive provisions and codifying the agreement. On June 29, 2014, the substantive terms of the agreement were finalized and codified, and they immediately filed a stipulation with the Court informing the Court of the settlement. *See* Dkt. 54. On June 30, 2014, in light of the parties'

settlement, the Court continued the hearing on Plaintiff's Motion for Class Certification to September 22, 2014. *See* Dkt. 55.

III. SUMMARY OF SETTLEMENT

The Settlement Agreement, attached to the Declaration of Travis Hodgkins as Exhibit A, provides for $2,100,000 as the Gross Settlement Amount. Settlement ¶ 2.22. This settlement is claims made with no reversion to the Defendant. Settlement ¶ 6.10.2. At least 70% of the Net Settlement Amount will be paid to the Class Members. *Id*. The remainder, if any, of the Net Settlement Amount will be paid to a *cy pres* beneficiary. *Id*.

There is also a non-monetary component to this settlement. Defendant as part of the settlement has agreed to clarify its meal and rest period policies, which adds a significant value to this settlement (Defendant estimates administrative costs alone will cost it $100,000 to make this clarification). Settlement ¶ 6.13.

The Net Settlement Amount[1] is the balance of the Gross Settlement Amount after the following are deducted:

- Up to $700,000.00 (one-third of the Gross Settlement Amount) for attorney's fees;[2]
- Up to $40,000.00 for attorney expenses and costs;[3]
- Up to $7,500.00 for the Enhancement Award to the representative plaintiff;[4]
- The employer's payroll taxes on the settlement shares;[5]
- The first $50,000.00 and any amount over $65,000 for administration of the settlement (Defendant has agreed to pay the administration costs that

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[1] Settlement ¶ 2.23
[2] Settlement ¶ 6.6
[3] Settlement ¶ 6.6
[4] Settlement ¶ 6.7
[5] Settlement ¶ 6.10.8

are between $50,000 and $65,000, separate from the Gross Settlement Amount).[6]

The Class is defined as all persons employed by Defendant in California in the non-exempt position of package handler at any time during the period of time from September 24, 2009 to the earlier of (1) the date of Preliminary Approval of the Settlement, or (2) September 1, 2014. Settlement ¶¶ 2.7 and 2.10. The Class is estimated to have 15,790 members. Settlement ¶ 2.9.

The Net Settlement Amount will be paid out to all Class Members who timely submit a valid claim form. The Notice Packet explains to the Class Members all the procedures for settlement and will provide the Class Members information as to how they may submit a claim for their respective proportionate share of the Net Settlement Amount. Settlement ¶ 6.4.1.

If the Class Members do not collectively claim at least seventy percent (70%) of the total Net Settlement Amount, then they shall have their shares of the Net Settlement Amount increased in relative proportion to the ratio used to initially calculate the Class Members' respective Claim Amounts, until at least 70% of the Net Settlement Amount is paid. Settlement ¶ 6.10.2. In the event the Class Members' claims exceed 70% of the Net Settlement Amount, then the actual amount claimed will be paid to the Class Members. Settlement ¶ 6.10.2. No money shall revert to Defendant from the settlement. *Id.*

Each Class Member's Claim Amount shall be determined by a point system, whereby each Class Member is awarded one (1) point for each workday of active employment worked during the Class Period, with an additional one (1) point for each workday a Class Member worked more than one sort (i.e., shift) during the workday, and an additional ten (10) points awarded to each terminated employee. Settlement ¶ 6.10.1. Each Class Member's points will then be divided by the total

[6] Settlement ¶ 6.3.4

number of points for all Class Members, and the resulting fraction then multiplied by the Net Settlement Amount.[7] Settlement ¶ 6.10.1.

The point system takes into account that the majority of the Class Members were part-time employees who usually only worked one shift (of up to four hours in length) each workday. Under Plaintiff's theories of recovery, FedEx Ground was required but failed to provide Class Members who worked two shifts in a workday a meal period as well as a second rest period. *See* Dkt. 30, p. 10-19; Dkt. 49, p. 6-17. The point system takes this into account and provides Class Members who were either full-time employees or worked more than one four-hour shift in a workday with more points and consequently a larger portion of the Net Settlement Amount.

Further, under Plaintiff's theories of recovery, Class Members whose employment terminated during the class period are entitled to waiting time penalties pursuant to Labor Code § 203 for unpaid wages. The point system takes this into account in awarding Class Members no longer employed by Defendant more points and consequently proportionately more of the Net Settlement Amount.

IV. PRELIMINARY APPROVAL OF THIS SETTLEMENT IS APPROPRIATE

A. Legal Standard

A proposed settlement under Federal Rule of Civil Procedure 23(e) must be "fundamentally fair, adequate, and reasonable." *Stanton v. Boeing Co*., 327 F.3d 938, 952 (9th Cir. 2003). Pursuant to Rule 23(e), "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval ." The purpose of Rule 23(e) is "to protect the unnamed members of the class from unjust or unfair settlements affecting their rights." *Ma v. Covidien Holding, Inc*., 2014 WL 360196 at *3 (C.D. Cal. Jan. 31, 2014), quoting *In re Syncor ERISA Litig*., 516 F.3d 1095, 1100 (9th Cir. 2008).

[7] Settlement ¶ 6.10.1

To determine the preliminary fairness of an agreement, the Court balances "the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; [and] the presence of a governmental participant." *Stanton*, 327 F.3d at 959, quoting *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003); *see also Ching v. Siemens Industry, Inc.*, 2013 WL 6200190 at *6-7 (N.D. Cal. Nov. 27, 2013) (applying these factors to a preliminary approval of class settlement). Preliminary approval is appropriate if "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval." *In re Tableware Antitrust Litig*., 484 F.Supp.2d 1078, 1079 (N.D. Cal. 2007), citing Manual for Complex Litigation, Second § 30.44 (1985). The question for preliminary approval of a settlement is whether it is "within the range of reasonableness." *Ross v. Trex Co., Inc.*, 2009 WL 2365865 at *3 (N.D.Cal. July 30, 2009).

The initial determination to approve or reject a proposed settlement is "committed to the sound discretion of the trial judge." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). The Court's role in evaluating the proposed settlement "must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and adequate to all concerned." *See Rodriguez v. West Publ'g Corp*., 563 F.3d 948, 965 (9th Cir. 2009), quoting *Officers for Justice*, 688 F.2d at 625. In evaluating a settlement agreement, it is not the Court's role to second-guess the agreement's terms. *Officers for Justice*, 688 F.2d at 625. "Rule 23(e) wisely requires court approval of the terms of any settlement of a class action, but the power

to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed." *Evans v. Jeff D.*, 475 U.S. 717, 726 (1986); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) ("Neither the district court nor this court ha[s] the ability to delete, modify or substitute certain provisions. The settlement must stand or fall in its entirety."). In general, there is a strong judicial policy favoring class settlements. *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).

B. The Proposed Class Meets the Standards for Preliminary Approval

1. Arms'-Length Negotiations

The settlement before the Court was reached through arms'-length bargaining. Each side was represented by reputable attorneys, experienced in wage and hour law and class action litigation. Each side prepared their case based on the extensive discovery exchanged between the parties and their own independent investigations. As evidenced by the briefing each side did in support of and in opposition of Plaintiff's Motion for Class Certification, both sides believed in the strength of their respective positions.

The settlement came about only after an experienced and skillful mediator provided his expertise, and even then only after the parties had fully briefed Plaintiff's Motion for Class Certification.

2. Sufficient Investigation and Discovery

As detailed above and in the Hodgkins Declaration (¶¶ 13-24), extensive discovery and investigation was conducted by both sides, including production and review of salient documents, and depositions of key players in the litigation. Additional information and data were provided by Defendants under the mediation privilege. Indeed, the settlement only came after the parties had fully investigated the class certification issues and fully briefed Plaintiff's Motion for Class Certification. Plaintiff believed he had mounted ample evidence to not only warrant

class certification but to also move forward into the "merits" portion of the case.

3. Class Counsel's Wage and Hour Class Action Experience

Here, counsel for both Plaintiff and Defendant have a great deal of experience in wage and hour class action litigation. Both of the firms that comprise Plaintiff's counsel have significant and reputable histories of litigating complex cases, including wage and hour class actions, such as the present case. As noted above, Plaintiff's counsel conducted extensive investigation of the factual allegations in this case and moved for class certification. Thus, based upon such experience and knowledge of the current case, Plaintiff's counsel believe that the current settlement is fair, reasonable, and adequate. In sum, there should be a presumption of fairness because the factors establishing such a presumption are clearly satisfied.

C. The Settlement is Fair, Adequate, and Reasonable

The Settlement for each participating Class Member is fair, reasonable and adequate, given the inherent risk of litigation, the risk of appeals, the risks in an area where it is argued that the law is unsettled, and the costs of pursuing such litigation. The Settlement here is within a range of reasonableness allowing for preliminary approval. Applying the rest of the factors here, the Settlement for each participating Class Member is fair, reasonable and adequate, given the inherent risk of litigation, the risk of appeals, the risks in an area where it is argued that the law is unsettled, and the costs of pursuing such litigation.

1. The Settlement is Fair and Reasonable Given Maximum Potential Recovery and Accompanying Risks of continued Litigation

To assess the fairness, adequacy and reasonableness of a class action settlement, the Court must weigh the immediacy and certainty of substantial settlement proceeds against the risks inherent in continued litigation. *See In re General Motors Corp.*, 55 F.3d 768, 806 (3d Cir. 1995) ("present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed

settlement."); *see also Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 616-17 (N.D. Cal. 1979).

2. Rest Periods

As argued in Plaintiff's Motion for Class Certification, package handlers work shifts that are commonly referred to as "sorts" that are between three and four hours in length. *See* Dkt. 30 at p. 10. FedEx Ground's policies do not permit a rest period when package handlers work 3.5 hours or less in a sort. *See* Dkt. 30 at p. 11-12. On the occasions when package handlers work more than one sort in a workday (and consequently work more than six hours), FedEx Ground's policies do not authorize a second rest period. *See* Dkt. 30 at p. 13-16.

Based on the investigation and discovery conducted to date, Plaintiff estimates that the high-end exposure for unpaid rest period premium wages under Labor Code § 226.7 is $8.4 million. *See* Hodgkins Decl. ¶ 20. That is, Plaintiff estimates that as of May 2014 package handlers worked 840,000 sorts in which they were entitled to a rest period but did not receive one. Plaintiff also estimates that the average rate of pay for package handler is $10.00 per hour. *Id*.

In opposition, Defendant contends that its policies authorize and permit package handlers to take all required rest periods under the law. *See* Dkt. 37 at p. 16-17. Defendant also contends that its actual practice is to provide every package handler a rest period every sort (unless the sort is less than two hours long). *See* Dkt. 37 at p. 17:12-17. Consequently, Defendant would contend that its exposure on certification, liability and/or damages is zero.

3. Meal Periods

Plaintiff contends that FedEx Ground's policies do permit and authorize package handlers to take a duty-free meal period when they work more than one sort in a workday. *See* Dkt. 30, p. 16-17; *see also* Dkt. 49, p. 17-19. FedEx Ground provides duty-free meal periods only when the sort, as opposed to the total hours worked in a day, is longer than six hours. *See id*.

Based on the investigation and discovery conducted to date, Plaintiff estimates that the high-end exposure for unpaid meal period premium wages under Labor Code § 226.7 is $10 million. *See* Hodgkins Decl. ¶ 21. Plaintiff estimates that as of May 2014 package handlers worked 1,000,000 sorts in which they were entitled to a duty-free meal period but did not receive one.

In opposition, Defendant contends that its policies properly authorize and permit package handlers to take duty-free meal periods. *See* Dkt. 37, p. 13-14. Defendant contends that the meal period for package handlers who work more than one sort in a day is the time between sorts, and the time between sorts is always thirty minutes or more and duty-free. *See* Dkt. 37, p. 15-16. Consequently, Defendant would contend that its exposure on certification, liability, and/or damages is zero.

4. Unpaid "Security Check" Time

Plaintiff contends that the time package handlers had to spend undergoing security screenings entering and exiting FedEx Ground facilities is compensable time that was unpaid by Defendant. *See* Dkt. 30, p. 19-22; Dkt. 49, p. 20-22.

At an estimated five minutes per workday as an average amount of time package handlers spent in security screenings, Plaintiff estimates that the maximum exposure for this claim is $3.5 million. *See* Hodgkins Decl. ¶ 22.

Defendant contends that Plaintiff's claim at best is a claim for unauthorized "off-the-clock" work that is not compensable or certifiable. *See* Dkt. 37, p. 18-20. Consequently, Defendant would likely argue that its exposure on certification, liability, and/or damages is zero.

4. Vacation

Pursuant to FedEx Ground's vacation policy, full and part-time Package Handlers are eligible to accrue vacation. Plaintiff contends that FedEx Ground's vacation policy resulted in forfeiture of vacation wages. *See* Dkt. 30, p. 22-23. Based on the investigation and discovery conducted to date, Plaintiff believes that

the exposure for this claim is low (relative to the other claims) and estimates that the maximum exposure for this claim is approximately $100,000. *See* Hodgkins Decl. ¶ 23.

Defendant contends that its vacation policy complies with the law, and that it has no exposure on this claim.

5. Reporting Time Pay

Plaintiff contends that FedEx Ground's "Report-In Pay" policy only compensates package handlers who show up for work and clock-in, but package handlers who show up and are sent home before they clock-in do not receive reporting time pay. *See* Dkt. 30, p. 22. Based on the investigation and discovery conducted to date, Plaintiff believes that the exposure for this claim is low and estimates that the maximum exposure for this claim is modest in the context of the other claims with estimated amounts. *See* Hodgkins Decl. ¶ 24.

Defendant contends that it reporting time pay policy complies with the law, and it properly pays reporting time. It would likely contend that its exposure is zero.

6. Costs and Risks of Continued Litigation

Another factor considered by courts in approving a settlement is the complexity, expense, and likely duration of the litigation. *Officers for Justice*, 688 F.2d at 625; *Girsh*, 521 F.2d at 157. In applying this factor, the Court must weigh the benefits of the Settlement against the expense and delay involved in achieving an equivalent or more favorable result at trial. *Young v. Katz*, 447 F.2d 431, 433-34 (5th Cir. 1971).

The Settlement provides to all Class Members, regardless of their means, fair relief in a prompt and efficient manner. Were the parties to engage in continued litigation of this matter, after class certification, the losing party could seek an appeal of the certification decision. Following a decision by the trier of fact, the losing party would also have the right to appeal. As the claims alleged by Plaintiff are almost entirely legal issues, it makes the likelihood of multiple appeals almost

certain. Given the realities of appellate practice, this process places ultimate relief several years away (indeed it can easily be five years or more).

The idea of balancing a fair recovery now, with settlement dollars being paid out now, versus a years-long appeal process regarding various potential issues, is a significant factor to be considered. *See National Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) (held proper "to take the bird in hand instead of a prospective flock in the bush"), and at 527 ("Avoiding such a trial and the subsequent appeals in this complex case strongly militates in favor of settlement rather than further protracted and uncertain litigation.").

Further, were the case to be denied class approval, the Class Members could be left without a remedy as a practical matter and courts across the state would have to address the issues presented here in a piecemeal, costly, and time-consuming manner. The Settlement in this case is therefore consistent with the "overriding public interest in settling and quieting litigation" that is "particularly true in class action suits." *See Van Bronkhorst v. Safeco Corp*., 529 F.2d 943, 950 (9th Cir. 1976).

7. Non-Admission of Liability by Defendants

Finally, Defendant denies any liability or wrongdoing of any kind associated with the claims alleged in this lawsuit, and further denies that, for any purpose other than that of settling this lawsuit, this action is appropriate for class treatment. Defendant maintains, among other things, that they have complied at all times with California wage and hour laws.

Because of such denial, if this case is not resolved, it will likely continue to be a long and protracted litigation.

D. The Settlement is Within the Range of Reasonableness

The maximum exposure estimated by Plaintiff is $22 million for actual loss. Given that Defendant would likely contend that it would defeat all of Plaintiff's claims and effectively nullify all exposure, the Court should discount the total value of the claims given the risks and costs of continued litigation. Accordingly, the total

exposure based on the defenses of Defendant could be argued to be somewhere between zero and $22 million.

In that light, a settlement in the gross amount of $2.1 million dollars, which is 9.55% of the estimated maximum exposure, is within the range of reasonableness. *See Ma v. Covidien Holding, Inc.*, 2014 WL 360196 at *5 (C.D. Cal. Jan. 31, 2014) (finding a settlement that is 9.1% of the total value of the action is within the range of reasonableness), citing *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998).

Not to mention, the non-monetary aspect of this settlement, namely, Defendant's agreement to clarify its meal and rest period policies adds significant value to this Settlement. Defendant estimates it will cost $100,000 to make the necessary changes to the meal and rest period policies. This added value increases the total of the settlement to $2.2 million. Moreover, the overall benefit to the Class is a benefit that will continue benefitting them for many years to come. As discussed previously, Plaintiff estimates Defendant's exposure for meal periods is $10 million and rest periods is $8.4 million, which works out to roughly $4.6 million per year (i.e., meal period exposure plus rest period exposure divided by four years). Each subsequent year after Defendant changes its meal and rest period policies to comply with this Settlement will be an added value to the Class of increased compliance for meal and rest periods.

E. The Proposed Cy Pres Beneficiary Should Be Approved

Pursuant to the Settlement Agreement, any funds remaining after distribution to class members are to be distributed to a *cy pres* beneficiary. *See* Settlement ¶ 6.10.3. Pursuant to the procedure set forth in the Settlement, within five days after filing this Motion, Defendant will propose three cy pres beneficiaries to Plaintiff, and then Plaintiff will pick one of the proposed cy pres beneficiaries. Then Plaintiff will provide this Court with supplemental briefing proposing the cy pres beneficiary with an explanation as to how the cy pres beneficiary meets the criteria for an appropriate

cy pres beneficiary. *See, e.g.*, *Eddings v. Health Net, Inc*., 2013 WL 169895 at *4 (C.D. Cal. Jan. 16, 2013) (setting forth the criteria for and granting approval of a cy pres beneficiary in a wage and hour class action).

V. THE PROPOSED SETTLEMENT CLASS SATISFIES THE ELEMENTS FOR CERTIFICATION

A. The Settlement Class Satisfies the Numerosity Requirement

The numerosity requirement is satisfied if the proposed class is "so numerous that joinder of all members is impracticable." FED. R. CIV. PROC. 23(a)(1). Impracticable does not mean impossible, only that it would be difficult or inconvenient to join all members of the class. *See Harris v. Palm Springs Alpine Estates, Inc*., 329 F.2d 909, 913-14 (9th Cir. 1964). The class consists of approximately 15,790 persons. *See* Settlement ¶ 2.9. Here, the class size is sufficiently numerous.

B. The Settlement Class Satisfies the Commonality Requirement

Commonality relates to whether there are "questions of law or fact common to the class." Fed. R. Civ. Proc. 23(a)(2). Commonality is satisfied if there is one issue common to class members. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2556 (2011); *see also Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1019 (9th Cir. 1998). Put another way, the key inquiry is not whether the plaintiffs have raised common questions, "even in droves," but rather, whether class treatment will "generate common *answers* apt to drive the resolution of the litigation." *Abdullah v. U.S. Security Associates, Inc*., 731 F.3d 952, 957 (9th Cir. 2013). "This does not, however, mean that *every* question of law or fact must be common to the class; all that Rule 23(a)(2) requires is a single *significant* question of law or fact." *Abdullah*, 731 F.3d at 957.

Here, Plaintiff contends the common issues include: (1) whether FedEx Ground provides rest periods based on the length of the "sort" as opposed to the total hours worked in a workday; (2) whether FedEx Ground provides meal periods based

on the length of the "sort" as opposed to the total hours worked in a workday; (3) whether it is a violation of California law to have meal and rest period policies that misstate the law even if they have other policies that arguably state the law correctly; (4) whether the time between sorts is a duty-free meal period; (5) whether it is a violation of California law to not have a policy or procedure to pay meal and rest period premiums immediately when those premium wages are owed; (6) whether the time package handlers are required to spend going through security screenings is compensable. Although Plaintiff believes there are many additional common issues, there are sufficient common issues described herein to satisfy this requirement.

C. Plaintiff is Typical of the Class Members

Under Rule 23(a)(3)'s permissive standards, "representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Ellis v. Costco Wholesale Corp*., 657 F.3d 970, 984 (9th Cir. 2011). Thus, typicality is satisfied if the plaintiff's claims are "reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020.

Here, typicality is readily satisfied. The proposed representative plaintiff seeks recovery based upon the same legal theories and factual circumstances as the putative class members in each subclass. Specifically, Plaintiff was employed by FedEx Ground in California as a non-exempt employee in the job position known as package handler from October 2007 to August 30, 2012. *See* Dkt. 30, p. 7. Plaintiff and the Class Members were all subject to the same policies and procedures that are the subject of this lawsuit. *See id*. at p. 7-8. Plaintiff is not subject to any unique defenses since the claims are predicated on Defendant's uniform policies and

practices which apply to all Class Members. *See id*. at p. 8.

D. Plaintiff is Adequate to Represent the Settlement Class

Under Rule 23(a)(4), class representatives must "fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). Adequate representation is usually presumed in the absence of contrary evidence. 3 Newburg on Class Actions § 7.24 (4th ed.) 2002.

Plaintiff shares common interests with the Class, has claims typical of the Class Members' claims, and is fully prepared to take all necessary steps to fairly and adequately represent the class and subclasses that he seeks to represent. *See* Dkt. 30, p. 8-9. No conflicts of interests exist and Plaintiff will continue to adequately and vigorously prosecute this action. *See id*. Accordingly, Plaintiff is adequate.

E. The Settlement Class Satisfies the Requirements of Rule 23(b)(3)

One of the three conditions under Rule 23(b) must be met. Plaintiff moves for certification under Rule 23(b)(3). *See* Dkt. 30, p. 9.

Rule 23(b)(3) asks if "the questions of law or fact common to class members *predominate* over any questions affecting only individual members." *Abdullah*, 731 F.3d at 963, quoting Fed.R.Civ.P. 23(b)(3) (emphasis added). "When one or more of the central issues in the action are common to the class and can be said to predominate," a class action will be considered proper "even though other matters will have to be tried separately." *Gartin v. S&M NuTec LLC*, 245 F.R.D. 429, 435 (C.D. Cal. 2007).

1. Questions of Law and Fact Predominate

Here, common questions of law or fact predominate over individual questions pursuant to Rule 23(b)(3). These issues of law and fact raised in this action are common to all members of the classes and predominate in this case. Here, Plaintiff contends that FedEx Ground's policies and procedures fail to provide rest periods to package handlers who work 3.5 hours; fail to provide rest periods to package handlers who work more than one sort in a workday; and fail to provide duty-free

meal periods to package handlers who work more than one sort in a workday. Plaintiff contends that FedEx Ground does not have any policies or procedures in place to pay package handlers meal or rest period premium wages immediately upon them becoming due. Plaintiff contends that the time package handlers are required by FedEx Ground to spend in security screenings while entering and exiting FedEx Ground facilities is compensable. Plaintiff contends that FedEx Grounds policies and procedures for reporting time pay fail to pay package handlers who show up for work but do not clock-in and are sent home. Plaintiff contends that FedEx Grounds vacation policy results in the forfeiture of vacation wages for package handlers. Based on the discovery and investigation done in this action, Plaintiff moved for class certification on the basis that Defendant committed these violations class-wide. Accordingly, questions of law and fact predominate over individual issues.

2. Superiority of Class Action

The requirement that a class action is superior to other methods of adjudication under Rule 23(b)(3) is also met. Courts have recognized that the class action device is superior to other available methods for the fair and efficient adjudication of controversies involving large number of employees in wage and hour disputes. *See, e.g. Hanlon*, 150 F.3d at 1022.

Thus, the Court should certify the Settlement Class as defined herein for the purpose of settlement only, appoint Plaintiff as the Class Representative, and appoint Plaintiff's counsel as Class Counsel.

In the event final approval of the Settlement is not granted, the Parties will occupy the same legal posture that they occupied at the outset of the litigation (e.g., this class certification will be vacated) and be free to assert any claim or defense that they could have asserted at the outset of the litigation, including Defendant's arguments against class certification.

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3. The Court Need Not Consider Manageability Issues for Settlement-Only Class

The manageability of trying the case as a class action is not a factor for a settlement-only class. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems ... for the proposal is that there be no trial."); *Trauth v. Spearmint Rhino Cos. Worldwide, Inc.*, 2012 WL 4755682 at *3 fn. 1 (C.D. Cal. Oct. 5, 2012); *Sandoval v. AB Landscaping, Inc.*, 2012 WL 4466585 at *4 (N.D. Cal. Sept. 26, 2012).

F. Plaintiff's Counsel Should Be Appointed Class Counsel

Rule 23(g) provides that courts must consider the following four factors when appointing class counsel: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. Fed.R.Civ.P. 23(g); *Guido v. L'Oreal, USA, Inc.*, 284 F.R.D. 468, 484 (C.D. Cal. 2012).

Plaintiff's counsel meet the criteria of Rule 23(g) because, as set forth in the concurrently filed declarations of Peter M. Hart, Travis Hodgkins, and Kenneth H. Yoon, Plaintiff's counsel have extensive experience in litigating complex cases, including wage and hour class actions, and are well-versed in the applicable law governing this area of law. Both firms have certified numerous wage and hour class actions, both contested and uncontested, and have Ninth Circuit appellate experience in the wage and hour class action field. *See* Hart Decl. ¶¶ 9-19; Yoon Decl. ¶¶ 6-11; Hodgkins Decl. ¶¶ 40-53.

Plaintiff's counsel conducted extensive pre-litigation and pre-settlement investigation of the claims of the proposed class and conducted extensive discovery,

including four depositions of Defendant (three of which were out-of-state) and voluminous document review, and filed a Motion for Class Certification. Plaintiff's counsel have committed more than adequate resources to representing the proposed class and have demonstrated the ability to handle and response to the unique challenges associated with complex, class litigation.

VI. THE PROPOSED CLASS NOTICE MEETS THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

The proposed notice (Exhibit 1 to the Settlement Agreement) complies with due process and Rule 23. Under Rule 23(e), the court "must direct notice in a reasonable manner to all class members who would be bound by the propos[ed settlement]." Fed.R.Civ.P. 23(e)(1). Class members are entitled to receive "the best notice practicable under the circumstances." *Wright v. Linkus Enter., Inc.*, 259 F.R.D. 468, 475 (E.D. Cal. 2009), quoting Fed.R.Civ.P. 23(c)(2). Notice is satisfactory if it "generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Churchill Vill., L.L.C. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004), quoting *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980). In addition, notice that is mailed to each member of a settlement class "who can be identified through reasonable effort" constitutes reasonable notice. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974); *see also Eddings v. Health Net, Inc.*, 2013 WL 169895 at *6 (C.D. Cal. Jan. 16, 2013) (finding that the parties' plan for notice by first-class mail met the "best practicable notice" standard where the settlement administrator would take steps such as database searches to ensure that class members' addresses were current and would re-mail returned notices).

Paragraph 6.3 of the Settlement provides that the court-appointed claims administrator will send by first class mail a copy of the court-approved notice and claim form to all Class Members. Class Members will have sixty (60) days from the date of the initial mailing to make a claim or request exclusion. Settlement ¶ 2.5.

Within twenty (20) days of the Claim Period Deadline, the claims administrator will send a postcard reminder to the Class. Settlement ¶ 6.3.1.

The Notice Packet shall provide Class Members with information as to how they may submit a claim for their respective proportionate shares of the Net Settlement Amount. Class Members will have until the Claim Period Deadline within which to complete and postmark their Claim Form for return to the Claims Administrator. Settlement ¶ 6.4.2.

Before sending the Notice Packet to the Class, the claims administrator will perform a national change of address ("NCOA") search and update the addresses per the results of the NCOA search. Settlement ¶ 6.3.1. In the event a Notice Packet is returned undeliverable, the Claims Administrator will make reasonable efforts to obtain a valid mailing address by using the social security number of the class member and standard skip tracing devices to conduct a search for a correct mailing address. Settlement ¶ 6.3.2. Notice Packets that have to be resent will be allowed a 15-day response period or the actual Claim Period Deadline, whichever is later. Settlement ¶ 6.4.2.

The Notice provides the Class everything they need to know in order to make an informed decision. It provides an explanation of the proposed Settlement and procedures on how to object and appear. The documentation provides a brief explanation of the case, the exclusion date and procedure for exclusion, the attorney's fees to be paid and the individual members' estimated recovery under the Settlement net of expenses, which are all included in the notice papers. It also states that those who do not opt out will be bound by the Settlement. *See* Class Notice at pp. 4, 6.

Though the Notice provides a blank, it will provide an estimated sum for litigation costs. Class Counsel will provide that sum at the time of the preliminary approval hearing, but presently the litigation costs are not expected to exceed $40,000.00, and the Parties have agreed to set out that figure in the Notice.

Plaintiff's counsel solicited bids from third-party claims administrators, and the parties have agreed to use Gilardi & Co. LLC. *See* Hodgkins Decl. ¶ 39. The actual claims administration costs will be presented to the Court as part of the briefing for the Motion for Final Approval of Class Action Settlement, but the current estimate is $72,000, which will be placed in the Notice of Settlement. *Id*.

VII. THE REQUESTED ENHANCEMENT IS REASONABLE

Pursuant to the terms of the Settlement, Defendant agreed not to oppose an enhancement payment to the Class Representative of $7,500, which Plaintiff requests this Court preliminarily approve. As noted above, Plaintiff Rangel travelled to and had his deposition taken at Defendant's offices in Los Angeles, California in a session lasting a full-day. Mr. Rangel also traveled to and prepared for this deposition with his counsel in Los Angeles. Mr. Rangel also worked with his counsel in preparing responses to written discovery, and also provided input into the Motion for Class Certification by way of a declaration. *See* Dkt 30-6.

Incentive awards for representative plaintiffs are both proper and routine. For example, in *Enterprise Energy Corp. v. Columbia Gas Transp. Corp.*, 137 F.R.D. 240, 250-51 (S.D. Ohio 1991), each representative plaintiff was granted a $50,000.00 incentive award. Also, the class representatives in *In re Dunn & Bradstreet Credit Servs. Customer Litig*., 130 F.R.D. 366, 377 (S.D. Ohio 1990), received incentive awards ranging from $35,000.00 to $55,000.00. Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate to induce individuals to step forward and assume the burdens and obligations of representing the class. In deciding the amount of an enhancement award for a class representative, relevant factors include the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefited from those actions and the amount of time and effort the plaintiff expended in pursuing the litigation. *See Cook v. Niedert*, 142 F.3d 1004, 1015 (7th Cir. 1998); *Van Vranken v. Atlantic Richfield Co*., 901 F. Supp. 294, 299-300 (N.D. Cal. 1995); *Bogosian v. Gulf*

Oil Corp., 621 F. Supp. 27, 32 (E.D. PA 1985).

Particularly in employment class actions, such as discrimination or wage claims, named plaintiffs should be entitled to an enhancement award as an incentive to take the risks associated with pursuing employment claims on behalf of other employees. An award is justified where the plaintiff is a "present or past employee whose present position or employment credentials or recommendation may be at risk by reason of having prosecuted the suit, who therefore lends his or her name and efforts to the prosecution of litigation at some personal peril." *Roberts v. Texaco*, 979 F. Supp. 185, 201 (S.D.N.Y 1997).

The amount sought by Plaintiff is warranted in this case. Plaintiff in addition to the work described above also engaged in telephone discussions on many occasions, provided detailed and crucial information by providing many pages of documents regarding the case, and providing information on the alleged policies and practices of Defendant that formed the substance of this litigation.

In addition, the Plaintiff ran the risk of not prevailing in this matter and thereby facing a cost bill and the possibility of payment of attorney's fees to Defendant, as the claim for vacation wages carries a two-way attorney's fees provision per California Labor Code § 218.5. This is a real risk that Plaintiff assumed at his own expense alone for the benefit of the Class—a risk that the other members of the Class did not have to face in order to get the benefits of this Settlement.

Further, by being the named Plaintiff, he put his name on the public record at the risk of possible future adverse employment consequences by future or potential employers who might choose to not hire him because he took the lead in this lawsuit. This, too, is a significant risk that he has borne for the class who will reap the benefits of this case without having to face this risk personally themselves. *See Roberts*, 979 F. Supp. at 201. This also should be considered in the award of the Class Representative Enhancement.

Finally, and as mentioned previously, as part of the Settlement, Plaintiff was required to provide Defendant with either a broader release, or a full and general release of any and all claims, something that the class members did not have to surrender in order to receive the benefits under this Settlement.

The amount of $7,500 to Plaintiff as the class representative is extremely reasonable given the risks that he took on and bore for the class and the benefits he conveyed on them. Based on the foregoing, Plaintiff requests that the Court preliminarily approve the enhancement award.

VIII. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court enter an order granting preliminary approval of this class action settlement.

DATED: August 11, 2014

LAW OFFICES OF PETER M. HART

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